Supreme Court, U.S.
FILED

No. 011836 JUN 13 2002

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In The
Supreme Court of the United States

JOHNNY E. WALKER,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's opinion in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987), is to be broadly construed so that ERISA pre-empts insurance regulations with common law roots, as it is construed in the Eleventh Circuit, or whether the mandate of *Pilot Life* applies only to laws outside the insurance law, as it is construed in the Second and Third Circuits?

2. Whether traditional pre-emption jurisprudence applies to ERISA, so that Walker's cause of action under Alabama insurance law is preserved by ERISA's savings clause?

PARTIES TO THE PROCEEDING BELOW

The Petitioner in this Court, Johnny E. Walker, is an individual who is the plaintiff in the District Court and was the appellee in the Court of Appeals.

The Respondent in this Court, Provident Life and Accident Insurance Company, is a corporation engaged in the business of insurance which is defendant in the District Court and was appellant in the Court of Appeals.

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OPINIONS BELOW

The Court of Appeals opinion that the petitioner asks this Court to review is *Walker v. Provident Life and Accident Insurance Co., UnumProvident Corp. and Southern Co. Services, Inc.,*[1] 279 F.3d 1289 (11th Cir.2002), which is reproduced in the Appendix. The district court opinion granting Walker's Motion to Amend the Complaint also is reproduced in the Appendix. *Walker v. Provident Life and Accident Insurance Co.,* Case # CV-00-AR-2253-S (N.D.Ala., February 6, 2001).

JURISDICTIONAL BASIS

This Petition asks the Court to review the January 23, 2002, opinion and judgment of the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals reversed the decision of the district court, which had permitted Walker to amend his complaint to add a claim under the State law of Alabama. The Court of Appeals denied Walker's petition for rehearing on March 15, 2002. The Eleventh Circuit issued its judgment as a mandate on March 26, 2002.

If the Court grants the Petition, it will have jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] UnumProvident Corp. was dismissed from the case on or about September 26, 2000. Southern Company Services, Inc., was dismissed from the case on or about November 16, 2000. They are no longer parties to the case and are not involved in this Petition.

STATUTE INVOLVED IN THE CASE

The so-called "savings clause" in ERISA, 29 U.S.C. § 1144(b)(2)(A) (excerpt):

> "[N]othing in this sub-chapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . ."

STATEMENT OF THE CASE

Walker is an ERISA participant. He brought an ERISA claim in federal district court against an insurance company, seeking to remedy a denial of disability benefits. He amended his federal complaint to add a cause of action for bad faith under Alabama insurance law.

Eleventh Circuit law holds that ERISA pre-empts such a cause of action, based upon the Supreme Court's opinion in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987). The district court granted leave to amend anyhow, based upon subsequent Supreme Court decisions. The district court relied upon the plain meaning of ERISA and the opinion of the Supreme Court in *Unum Life Ins. Co. of America v. Ward,* 119 S.Ct. 1380 (1999).

Provident brought an interlocutory appeal of the district court's decision granting leave to amend the complaint. The Eleventh Circuit reversed, adhering to its position prior to *Ward,* and relying upon a broad reading of *Pilot Life.*

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER *PILOT LIFE INS. CO. v. DEDEAUX* REQUIRES A DEPARTURE FROM TRADITIONAL PRE-EMPTION JURISPRUDENCE.

A. Traditional Pre-emption Jurisprudence Emphasizes the Intent of Congress as Expressed in the Statute.

The Eleventh Circuit construed this Court's opinion in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987), to require a broad interpretation of ERISA pre-emption. Under the Eleventh Circuit's construction, ERISA pre-empts any State law with common law roots, even though the law is associated exclusively with the insurance industry. That broad construction of *Pilot Life* is at odds with this Court's traditional pre-emption jurisprudence.

Traditional pre-emption jurisprudence confines the reach of statutory federal pre-emption to the explicit intent of Congress. In pre-emption analysis, the "ultimate touchstone" is the purpose of Congress. *Metropolitan Life, supra,* 105 S.Ct. at 2393; *Malone v. White Motor Corp.,* 98 S.Ct. 1185, 1190 (1978); *Retail Clerks v. Schermerhorn,* 84 S.Ct. 219, 222 (1963). The courts' task in deciding pre-emption cases "is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw v. Delta Air Lines, Inc.,* 103 S.Ct. 2890, 2899 (1983).

Prior to *Pilot Life,* for example, the Court held in a 1985 ERISA case that a Massachusetts statute requiring minimum mental health care benefits was preserved. *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. 2380 (1985). The Court held, "We therefore decline to impose

any limitation on the savings clause beyond those Congress imposed in the clause itself." *Id.*, 105 S.Ct. at 2392-93. The Court found that ERISA's language, structure and legislative history called for preservation of state insurance laws under the savings clause. The *Metropolitan Life* opinion explained that state laws which regulate insurance were saved under ERISA, whether or not they were related to ERISA's substantive provisions. *Id.*, 105 S.Ct. at 2393.

The Eleventh Circuit panel in the current case agreed that the intent of Congress is the key question. ("Our inquiry begins with the intent of Congress.") Nonetheless, the ruling below would deprive the state legislatures of their authority to regulate the business of insurance, whenever the regulation in question had common law roots. This is contrary to the intent of Congress as first expressed in McCarran-Ferguson in 1945 and then re-emphasized in ERISA.

McCarran-Ferguson is a states' rights statute which provides, in relevant part, "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Quoted in *Pilot Life*, 107 S.Ct. at 1553, n.2; *see U.S. Department of Treasury v. Fabe*, 113 S.Ct. 2202, 2207 (1993) (referring to state regulation as the "mission" of McCarran-Ferguson).[2] Prior to the

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[2] In *Fabe*, the five-Justice majority ruled for the broadest construction of McCarran-Ferguson, so as to include within its scope laws associated with bankruptcy priorities. The four dissenters would have limited the scope of McCarran-Ferguson to statutes "designed to protect or regulate the relationship between an insurance company and its policyholders, whether this end is accomplished in a direct or indirect

(Continued on following page)

passage of McCarran-Ferguson, the Supreme Court held that insurance was interstate commerce. *U.S. v. South-East Underwriters Ass'n*, 64 S.Ct. 1162 (1944). Within a year, Congress enacted McCarran-Ferguson to re-establish that continued state regulation of insurance was in the public interest. *Fabe, id.* Thus, there is a "strong federal policy" which defers to the states for regulation of the insurance industry. *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 147 (8th Cir.1995).

When ERISA came along, Congress re-stated its intent to preserve the primacy of state regulation over insurance. The point of the ERISA savings clause was to continue the same purpose embodied in McCarran-Ferguson itself:

> The ERISA saving clause, with its similarly worded protection of "any law of any State which regulates insurance," appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. The saving clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language to define what is left to the States.

Metropolitan Life Ins. Co. v. Massachusetts, 105 S.Ct. 2380, 2391 n.21 (1985).

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way. . . ." *Fabe*, 113 S.Ct. at 2213. The Alabama cause of action at issue in the current case would satisfy all nine Justices. It regulates insurance even under the more stringent test proposed by the dissenters in *Fabe*.

B. The Supreme Court *Pilot Life* Decision, Which Discussed ERISA Pre-Emption in General.

In 1987 the Court was "again called on to interpret" the reach of ERISA pre-emption in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549, 1553 (1987). *Pilot Life* precluded an ERISA participant from bringing a Mississippi state law tort claim. The primary foundation for that result undisputedly is consistent with traditional pre-emption jurisprudence, because it tracks the limitation found in the savings clause itself. The dispositive finding was, "Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under the Mississippi law." 107 S.Ct. at 1554. That finding was sufficient to resolve the case, but the *Pilot Life* opinion went further.

In contrast to *Metropolitan Life,* which "decline[d] to impose any limitation on the savings clause beyond those Congress imposed in the clause itself," *Metropolitan Life, supra,* 105 S.Ct. at 2392-93, the *Pilot Life* decision imposed two additional limitations.[3] First, it held, "Mississippi's law of bad faith, even if associated with the insurance industry, has developed from general principles of tort and contract law available in any breach of contract case." *Pilot Life,* 107 S.Ct. at 1555. Second, the Court held in *Pilot Life,* " . . . ERISA's civil enforcement remedies were

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[3] *Pilot Life* distinguished the *Metropolitan Life* case because the mandated benefits law at issue in *Metropolitan Life* "define[d] the terms of the relationship between the insurer and the insured," *Pilot Life,* 107 S.Ct. at 1555, and because *Metropolitan Life* "involve[d] a state law that conflicted with a substantive provision of ERISA." *Pilot Life* held that *Metropolitan Life* was not of general authority, and that its reach only included the particular kind of law before the Court.

intended to be exclusive," 107 S.Ct. at 1556-57, because the legislative history indicated that the pre-emptive force of ERISA was "modeled after § 301 of the LMRA." *Id.*, 107 S.Ct. at 1557.

C. The Expansive View of *Pilot Life* in the Eleventh and Ninth Circuits.

This departure from traditional pre-emption analysis sparked a conflict in the circuits in applying the *Pilot Life* decision. In the current case, the Eleventh Circuit relied on *Pilot Life* to preclude Alabama state insurance law claims, as it had held previously.[4]

The Alabama statute is Ala. Code § 27-12-14. It appears within the "Insurance" title of the Code and the cause of action appears in the "Insurance" chapter of the Alabama Pattern Jury Instructions. *See Gilbert v. Alta Health & Life Insurance Co.*, 122 F.Supp. 2d 1267, 1272 (N.D.Ala.2000), *reversed,* 276 F.3d 1292 (11th Cir.2001). The Eleventh Circuit held that the Alabama cause of action does not regulate insurance, even though the purpose of Chapter 12 of the Insurance Code is precisely to regulate insurance, according to the Alabama legislature:

> The purpose of this chapter is to regulate trade practices in the business of insurance in accordance

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[4] *Belasco v. W.K.P. Wilson & Sons*, 833 F.2d 277 (11th Cir.1987); *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430 (11th Cir.1989); *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562 (11th Cir.1994); *Gilbert v. Alta Health and Life Insurance Co.*, 276 F.3d 1292 (11th Cir.2001).

> with the intent of congress as expressed in the Insurance Regulation Act. . . .

Trade Practices Law, Alabama Insurance Code § 27-12-1.

According to the Eleventh Circuit, *Pilot Life* depleted the savings clause, so that state laws are pre-empted if they have common law roots – even including those codified in the Insurance Code and which apply only to insurers. Citing *Pilot Life,* the Eleventh Circuit held in the current case that the Alabama insurance law does not regulate insurance under the common sense test. The Eleventh Circuit stated, "The fact that the Alabama tort has been codified to apply specifically to the insurance industry does not erase the presence of common law roots."[5] The Ninth Circuit reached a similar conclusion in *Kanne v. Connecticut General Life Ins. Co.,* 867 F.2d 489 (9th Cir.1989) ("In *Pilot Life,* the Supreme Court held that state common law causes of action arising from the improper processing of a claim are preempted by federal law.").

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[5] The Eleventh Circuit also held that the "common-sense view does not support application of the savings clause" to the Alabama cause of action. The Court of Appeals' view of common sense carries great weight, as the opinion in *Ward* directs. *Ward*, 119 S.Ct. at 1386 (holding that the common sense of the Court of Appeals is entitled to deference, because, "[W]e do not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law."). But the Eleventh Circuit has spoken with two different voices on the question of common sense. In *Anschultz v. Connecticut General Life Ins. Co.*, 850 F.2d 1467, 1468-69 (11th Cir.1988), the Eleventh Circuit took the view opposite from the current case and held that common sense indicates that a statute which is codified in the Insurance Code "regulates insurance."

D. The Contrary View of the Second and Third Circuits.

The Mississippi statute which was before the Court in *Pilot Life* was not an insurance regulation. It applied generally, in that it reached defendants other than insurance companies. In that light, an alternate reasonable interpretation of *Pilot Life* was adopted by the Third Circuit and then the Second Circuit, both of which held that the mandate of *Pilot Life* was limited to laws of general applicability. According to those two Courts of Appeal, *Pilot Life* had no effect on state insurance laws.

The Third Circuit case which anticipated *Ward* was *Pas v. Travelers Ins. Co.*, 7 F.3d 349 (3rd Cir.1993). *Pas* held that a state law providing a remedy for discrimination in insurance contracts against certain handicapped persons was not pre-empted by ERISA. The Third Circuit applied the analytical framework set out in *Pilot Life,* but held that the New Jersey statute in question "is distinguishable from any generic unfair trade practice statute." 7 F.3d at 356. There was no discussion in the *Pas* opinion as to whether the New Jersey statute had common law roots.

The Second Circuit case which anticipated *Ward* was *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2nd Cir.1995). The Second Circuit interpreted *Pilot Life* as limited to its facts, so that the holding of *Pilot Life* applied only to laws which were not insurance laws. *Id.*, 50 F.3d at 150 (holding that *Pilot Life* "involve[s] statutes that, while impacting on the insurance industry, are based upon general contract and tort principles."). In *Franklin H. Williams* the Second Circuit considered a claim for violation of a New York law requiring an insurer

to pay interest for life insurance benefits beginning at the date of death. The insurer urged that the New York law was unprotected by the savings clause, on two grounds: (i) it did not regulate insurance; and (ii) it was inconsistent with ERISA's exclusive enforcement scheme. The Second Circuit rejected both arguments. Relying upon *Metropolitan Life,* the Second Circuit applied a "common sense test" to the state law, and said that "to state the obvious, [the state law] regulates the terms of certain insurance contracts, and so seems to be saved from preemption by the savings clause. . . . " *Id.,* 50 F.3d at 149.

E. The Supreme Court Has Already Resolved the Conflict By Confirming the View Taken by the Second and Third Circuits.

The interpretation in the Second and Third Circuits has been vindicated by this Court's decisions beginning in 1993 and culminating in *Unum Life Ins. Co. of America v. Ward,* 119 S.Ct. 1380 (1999). In *Ward*, the Court stressed the application of the common sense test (119 S.Ct. at 1386-87):

> The [California] rule thus appears to satisfy the common sense view as a regulation that hones in on the insurance industry and does "not just have an impact on that industry."

Ward, 119 U.S. at 1386-87 (citing *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987)).

Ward's action against UNUM claimed that the denial of benefits was improper because of the California notice-prejudice rule, a judicially-created doctrine. The notice-prejudice rule provides that an insurer may not deny an untimely insurance claim unless it can establish that it

suffered actual prejudice from the late notice. The issues in *Ward* essentially mirror the issues in the Second Circuit case *Franklin H. Williams*. Just as Travelers had claimed in the Second Circuit case, in the *Ward* case, UNUM claimed: (i) the rule did not fall within ERISA's savings clause because it was not a law regulating insurance; and (ii) even if the notice-prejudice rule fell within the savings clause, it provided a remedy which was in conflict with ERISA's civil enforcement scheme. In a unanimous opinion written by Justice Ginsburg, the Supreme Court rejected UNUM's claims.

The Supreme Court's view of its *Pilot Life* decision is clear from the discussion in *Ward* which directs that *Pilot Life* must be viewed in context, and the context was a "law not specifically directed to the insurance industry." *Ward,* 119 S.Ct. at 1390 n.7. On that basis, the opinion in *Ward* distinguished *Pilot Life*: "[*Pilot Life*] concerned Mississippi common law creating a cause of action for bad faith breach of contract, law not specifically directed to the insurance industry and therefore not saved from ERISA pre-emption." *Id. Ward* confirms that the Second and Third Circuits correctly interpreted the intent of Congress, which is the interpretation of *Pilot Life* upon which Walker relies in this appeal.

Under current Supreme Court holdings, the reach of ERISA pre-emption is subject to traditional pre-emption analysis. *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* 117 S.Ct. 832, 843 (1997) (Scalia, J., *concurring*) ("I think it accurately describes our current ERISA jurisprudence to say that we apply ordinary field pre-emption, and, of course, ordinary conflict pre-emption."); *Egelhoff v. Egelhoff,* 121 S.Ct. 1322, 1330-31 (2001) (Scalia, J., *concurring*) ("I persist in

the view that we can bring some coherence to this area, and can give the statute both a plausible and precise content, only by interpreting the 'relate to' clause as a reference to our ordinary pre-emption jurisprudence."). ERISA opinions from 1993 to the present confirm this. Looking back from the vantage point of 1997, Justice Scalia put it this way:

> Our new approach to ERISA pre-emption is set forth in *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 99 (1993): "we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional pre-emption analysis."

Dillingham Construction, supra, 117 S.Ct. at 843 (Scalia, J., *concurring*).

None of the justices have expressed disagreement with Justice Scalia on this point, and three justices have explicitly endorsed his view. Justice Ginsburg joined in both of the quoted concurrences (*Dillingham Construction* and *Egelhoff*). Justices Breyer and Stevens dissented from the result in *Egelhoff*, which held that a Washington statute in the Code of Probate was pre-empted. At the same time, Justices Breyer and Stevens expressed agreement with Justice Scalia's description that traditional pre-emption principles constitute the current mode of ERISA analysis in the Supreme Court. Justice Breyer's dissent set out the recent case law:

> Like Justice Scalia, I believe that we should apply normal conflict pre-emption and field pre-emption principles where, as here, a state statute covers ERISA and non-ERISA documents alike. . . . Our more recent ERISA cases are consistent

> with this approach. See *DeBuono v. NYSA-ILA Medical and Clinical Services Fund,* 520 U.S. 806, 812-13 (1997) (rejecting literal interpretation of ERISA's pre-emption clause); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.,* 519 U.S. 316, 334 (1997) (narrowly interpreting the clause); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 656 (1995) ("go[ing] beyond the unhelpful text [of the clause] and the frustrating difficulty of defining its key term, and look[ing] instead to the objectives of the ERISA statute as a guide"). See also *Boggs v. Boggs,* 520 U.S. 833, 841 (1997) (relying on conflict pre-emption principles instead of ERISA's pre-emption clause).

Egelhoff, 121 S.Ct. at 1331 (Breyer, J. *dissenting*).

Traditional pre-emption jurisprudence calls for reversal of the Eleventh Circuit law. The Alabama cause of action hones in on the insurance industry under *Ward* and thus regulates insurance under ERISA.

II. CONGRESS DID NOT INTEND TO "SUPER PRE-EMPT" THE FIELD OF REGULATION OF INSURANCE.

The Eleventh Circuit below disallowed Walker's State law cause of action, relying primarily upon the broad construction of *Pilot Life* which would deny the protection of the savings clause to insurance statutes with common law origins. A second potential ground for pre-emption is also at issue in the present Petition. It is the possibility of implied "field pre-emption."

"Field pre-emption" or "super pre-emption" are terms for the exclusive occupation of a given regulatory turf, based upon the Supremacy Clause in Article VI of the Constitution. *See Silkwood v. Kerr-McGee Corp.,* 104 S.Ct. 615, 621 (1984) (citations omitted):

> If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Thus, in exercising its broad supremacy powers, Congress can go beyond nullification of conflicting State laws; according to this possible interpretation of ERISA, even remedies which are compatible with or supplementary to ERISA are pre-empted.

The principles of federalism and state sovereignty require that the Courts invoke field pre-emption only where Congressional intent is manifest. Consideration of pre-emption issues starts "with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 67 S.Ct. 1147, 1152 (1947). Field pre-emption is inferred by the courts only when Congress has regulated the area comprehensively or when the subject is peculiarly within the federal domain. *Hillsborough County v. Automated Medical Laboratories, Inc.,* 105 S.Ct. 2371 (1985) (applying field pre-emption either where Congress "left no

room" for state regulation or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"); *see Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n,* 103 S.Ct. 1713, 1722 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul,* 83 S.Ct. 1210, 1217-18 (1963); *Rice, supra*. Furthermore, "The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously." *Cippolone v. Liggett Group, Inc.,* 112 S.Ct. 2608, 2626 (1992) (Blackmun, J., *concurring*).

No intent to pre-empt state insurance law remedies is explicit in ERISA; however, in *Pilot Life* the Court found indications of Congressional intent in the legislative history. The Court held in *Pilot Life,* " . . . ERISA's civil enforcement remedies were intended to be exclusive," 107 S.Ct. at 1556-57, because the legislative history indicated that the pre-emptive force of ERISA was "modeled after § 301 of the LMRA." *Id.,* 107 S.Ct. at 1557. There is reference to the Labor Management Relations Act ("LMRA") in the legislative history of ERISA. *Pilot Life* endorsed this comparison between ERISA and the LMRA (107 S.Ct. at 1555). The LMRA is an example of broad pre-emption of an entire field of law, precluding all state law remedies which depend upon an interpretation of a Collective Bargaining Agreement. *Textile Workers v. Lincoln Mills,* 77 S.Ct. 912 (1957).

Although the *Pilot Life* opinion recites that it reached a "resolution" of this exclusivity question, 107 S.Ct. at 1558, the finality of this "resolution" is repudiated in *Ward.* In *Ward,* the Court noted that it need not decide the

issue of whether state insurance law remedies were pre-empted, because in *Ward* the plaintiff was proceeding solely under ERISA. "The notice-prejudice rule supplied the relevant rule of decision for this § 502(a) suit. The case therefore does not raise the question whether § 502(a) provides the sole launching ground for an ERISA enforcement action." *Id.,* 119 S.Ct. at 1391. *Ward* characterizes *Pilot Life* as having "discussed" rather than resolved the question. *Ward, supra,* 119 S.Ct. 1390 n.7. The question thus remains open as to whether ERISA implicitly pre-empts the entire field of employee benefits so as to preclude *all* state law remedies, even those found in the state's insurance regulations. *Ward, supra,* 119 S.Ct. at 1390-91 & n.7.

Although field pre-emption, or so-called "super pre-emption," is an open question, Provident is swimming against the tide in trying to convince the Court that Congress implicitly intended to override traditional state regulation of insurance. Consideration of pre-emption issues starts with the assumption that the historic powers of the States are not superseded unless that is the clear and manifest purpose of Congress. Here the Court must begin with the premise that in ERISA Congress clearly manifested an intent to *preserve* (rather than supersede) traditional state regulation of insurance.

State Insurance regulation is compatible with ERISA. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank,* 114 S.Ct. 517, 523 (1993) ("[W]e hold ERISA leaves room for complementary or dual federal and state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated. . . . "); *see FMC Corp. v. Holliday,* 498 U.S. 52, 64 (1990) ("If a plan is insured, a State may regulate it

indirectly through regulation of its insurer and its insurer's insurance contracts."). Under traditional pre-emption principles, field pre-emption is disfavored and requires a deeper and more detailed analysis of Congressional intent. *Hillsborough County, supra,* 105 S.Ct. at 2376 ("Appellee must thus present a showing of implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.").

The outcome of traditional field pre-emption analysis is that the Alabama insurance law cause of action is not pre-empted, based upon three factors: (i) the purposes of ERISA; (ii) the point that insurance law is traditionally an area where Congress defers to state sovereignty; and (iii) the lack of an adequate remedial scheme in the employee benefits portion of ERISA.

The Court should decline to infer a Congressional intent to super pre-empt state insurance law, based upon the policy behind ERISA. The purpose of ERISA is to protect the interests of participants and their beneficiaries in employee benefit plans. 29 U.S.C. § 1001(b) (1994).

Uniformity is another important purpose of ERISA. Congress intended to provide uniformity of enforcement in order to protect employers from the necessity of complying with rules varying from state to state. The purpose of uniformity applies to employers, but not insurers. The Congress' concern was that employers as administrators "would not have to administer their plans differently in each state in which they had employees." *Fort Halifax Packing Co., Inc. v. Coyne,* 107 S.Ct. 2211, 2217 (1987) ("It

is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities."). The same concern does not apply to insurance companies, which are already subject to the varying rules of the fifty states. The result in the Court below would give primacy to protection for insurance companies, as if the protection of participants and beneficiaries was a secondary aim, subordinate to the goal of uniform enforcement.

Congress attached a great deal of importance to the distinction between self-insured plans and those plans covered by insurance. The so-called "deemer clause" is one expression of this distinction. The deemer clause provides in relevant part that no employee benefit plan "shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts. . . . " 29 U.S.C. § 1144(b)(2)(B). Hence, employers are excused from compliance with State regulations; insurance companies are not. The deemer clause would serve no purpose otherwise.

It regularly falls to the courts to resolve the competing claims for attention among such worthy goals as uniformity, protection of participants and preservation of traditional state sovereignty. While it is true that Congress wanted to promote nationwide uniformity, at the same time Congress intended not to displace state insurance laws which protect the interests of employees and their beneficiaries. *Metropolitan Life, supra,* 105 S.Ct. at 2393 ("[D]isuniformities, however, are the inevitable result of the congressional decision to 'save' local insurance regulation. Arguments as to the wisdom of these policy choices

must be directed at Congress."), *quoted in Ward,* 119 S.Ct. at 1390 n.6.

Regulation of employee benefits by the states is compatible with ERISA. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank,* 114 S.Ct. 517, 523 (1993) ("[W]e hold ERISA leaves room for complementary or dual federal and state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated . . . . "); *see also Humana, Inc. v. Forsyth,* 119 S.Ct. 710 (1999) (holding Nevada State Insurance Law remedies complement and co-exist with federal RICO remedies.).

The finding in *Pilot Life* that Congress intended its remedial section to be exclusive is based on a comparison to the LMRA. It stems from a sentence in the Conference Report which reads, "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."

The sentence in the Conference Report which makes the comparison to LMRA will not nearly bear the great interpretive weight which *Pilot Life* suggested it would carry. Insurance is traditionally subject to State regulation. By contrast, labor/management relations necessarily is an area of federal rather than State sovereignty. The major federal concerns are preserving industrial peace and maintaining the flow of interstate commerce. ERISA rights are of course significant, but violations of ERISA do not have the cross-border implications which are the stuff of labor unrest. *See generally Groves v. Ring Screw Works, Ferndale Fasteners Div.,* 111 S.Ct. 498 (1990). Nothing in

ERISA compares with labor strikes with their significant interruption of interstate commerce and their attendant potential for violence.

For that reason the LMRA dominates the entire field of labor/management relations. The enforcement provision of the LMRA (§ 301) thus differs from § 502 of ERISA in that it is part of a federal scheme which endeavors to ensure industrial peace. Uniformity is a secondary purpose of ERISA, but it is basic to LMRA. In *Lingle v. Norge Division of Magic Chef, Inc.,* 108 S.Ct. 1877 (1988), the Court held that the primary purpose of the LMRA was to "ensure uniform interpretation of Collective Bargaining Agreements to promote peaceable consistent resolution of labor/management disputes." The Court stated:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Id., 108 S.Ct. at 1880.

The necessity for uniform interpretation was the basis of Congress' intent that the LMRA provide exclusive remedies. *See Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California,* 103 S.Ct. 2840, 2854 n.28 (1983) ("§ 301(a) of the LMRA applies to *all* [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry effecting commerce . . . or between any such labor organizations.") (emphasis added, internal quotation marks omitted).

The Court should decline to infer a congressional intent to super pre-empt state insurance law, because insurance law traditionally is not a federal area of regulation. In areas of traditional State regulation, the presumption is against pre-emption. *See Egelhoff v. Egelhoff,* 121 S.Ct. 1322 (2001) (Breyer, J. *dissenting*):

> The more serious pre-emption question is whether this state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In answering that question, we must remember that petitioner has to overcome a strong presumption *against* pre-emption. That is because the Washington statute governs family property law – a field of traditional state regulation, where courts will not find federal pre-emption unless such was the clear and manifest purpose of Congress, or the state statute does major damage to clear and substantial federal interests.

121 S.Ct. at 1332-33 (Breyer, J. *dissenting*) (citations and internal quotation marks omitted).

The Court should decline to infer a congressional intent to super pre-empt state insurance law, because ERISA does not specify a comprehensive enforcement mechanism. The Supreme Court held in *Hillsborough County, supra,* 105 S.Ct. at 2371, that field pre-emption might apply where Congress "left no room" for state regulation. In ERISA Congress left plenty of "room" for State remedies. The rules which limit the remedies available to ERISA participants and beneficiaries emerged from judicial interpretation of Congress' silence. Congress did not say yay or nay to extra-contractual damages, jury trials, or the arbitrary and capricious standard of proof. They were all matters of judicial interpretation.

In light of the Congressional purpose of protecting participants and beneficiaries, the logical conclusion is that Congress purposely left out the specifics of the damages so that the States could act as they see fit. There is no evidence that Congress wished to nullify the long-standing tradition of remedies in court to protect against aggravated or egregious violations. When Congress promulgates employment law legislation, it ordinarily provides such remedies. In the Fair Labor Standards Act and the Equal Pay Act, the enforcement provision in 29 U.S.C. § 216(b) authorizes juries to award the amount of unpaid minimum or overtime wages, or the amount of back pay as appropriate, plus an additional equal amount for liquidated damages. (Liquidated damages are subject to a good faith exception, 29 U.S.C. § 260.) Section 216(e) sets out specific civil penalties for child labor violations.

Remedies in ERISA are tailored to protect accumulated pension benefits, but ERISA is silent with regard to any meaningful regulation of insurers. Instead, it saves to the states the continuing responsibility to regulate insurers. It makes little sense for Congress to have specifically saved state insurance laws and then strip the states of their ability to enforce their laws. To affirm the decision below would be to find that Congress implicitly supplanted an entire domain of traditional state regulation, without making any provision for remedying aggravated or egregious violations.

CONCLUSION

This Court should grant the writ and reverse the judgment below. Petitioner's cause of action under Alabama insurance law is not pre-empted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12100

D.C. Docket No. 00-02253-CV-AR-S

JOHNNY E. WALKER,

Plaintiff-Appellee,

versus

SOUTHERN COMPANY SERVICES, INC.,
UNUMPROVIDENT CORPORATION,

Defendants,

PROVIDENT LIFE & ACCIDENT INSURANCE CO.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(January 23, 2002)

Before TJOFLAT and BIRCH, Circuit Judges, and GOLDBERG*, Judge.

BIRCH, Circuit Judge:

In this case, we decide whether the Supreme Court's decision in *UNUM Life Ins. Co. of America v. Ward,* 526

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* Honorable Richard W. Goldberg, Judge, U.S. Court of International Trade, sitting by designation.

U.S. 358, 119 S. Ct. 1380 (1999) alters the application of the savings clause of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(b)(2)(A), such that the tort of bad faith under Alabama law is now saved from preemption. At the district court, the plaintiff Walker sought to amend his complaint to add the state law tort claim. After the district court granted leave to amend, the defendant Provident Life Insurance Company ("Provident") brought this interlocutory appeal. We conclude that *Ward* did not change ERISA's preemptive effect on the Alabama law of bad faith, and REVERSE the decision of the district court.[1]

I. BACKGROUND

Few facts are needed to resolve this appeal. Walker brought an ERISA plan enforcement action pursuant to 29 U.S.C. § 1132(a)(1)(B), alleging that Provident failed to pay disability benefits due to him under the long term disability plan of Southern Company Services, Incorporated. After filing his complaint, Walker sought leave to add the claim that Provident's unwillingness to disperse benefits violated Alabama Code § 27-12-24, which creates liability for bad faith refusal to pay insurance claims. The district court granted Walker's motion. Provident then petitioned for interlocutory review, which was granted by our court.

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[1] While Walker's appeal was pending, we decided *Gilbert v. Alta Health & Life Ins. Co.*, in which we concluded that the Alabama law of bad faith is not saved from ERISA preemption. *See* ___ F.3d ___ (11th Cir. Dec. 27, 2001).

II. DISCUSSION

We review the district court's decision to grant leave to amend the pleadings for abuse of discretion. *Butts v. County of Volusia,* 222 F.3d 891, 892 n.2 (11th Cir. 2000). When reviewing the district court's ERISA preemption analysis, we use a *de novo* standard. *Hall v. Blue Cross/Blue Shield of Ala.,* 134 F.3d 1063, 1064-65 (11th Cir. 1998).

Our preemption analysis begins with legislative intent. *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977). Congress passed ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). In an attempt to ensure the scheme's comprehensiveness, Congress included a preemption provision: ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).

The effect of ERISA's preemption provision is tempered by a savings clause: state laws which "regulate insurance" are not preempted. 29 U.S.C. § 1144(b)(2)(A). This clause provides that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ." In this appeal, neither party disputes that the Alabama law "relates to" employee benefit plans; the question is whether the Alabama law "regulates insurance." The question, in other words, is the interpretation of the savings clause.

To determine whether a state law regulates insurance under the savings clause, we follow a two part analysis developed by the Supreme Court. First, we ask whether common sense suggests that the law regulates insurance. *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 740, 105 S. Ct. 2380, 2389 (1985). Under this inquiry, a law must be specifically directed toward the insurance industry; mere impact on the industry is insufficient. *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 50, 107 S. Ct. 1549, 1554 (1987). Second, we consider whether the state law governs the "business of insurance" as defined by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq. Metropolitan Life,* 471 U.S. at 742-43, 105 S. Ct. at 2390-91. The McCarran-Ferguson Act definition is a function of three inquiries: "*first,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129, 102 S. Ct. 3002, 3009 (1982).

The Supreme Court applied the *Metropolitan Life* framework to the state law of bad faith in Mississippi, and found that the savings clause did not apply. *Dedeaux,* 481 U.S. at 57, 107 S. Ct. at 1558. Our court applied the reasoning of *Dedeaux* to the Alabama law of bad faith in 1987. *Belasco v. W.K.P. Wilson & Sons, Inc.,* 833 F.2d 277 (11th Cir. 1987). We determined that

> the Alabama law of bad faith appears to us to have the same roots "in the general principles of . . . tort and contract law" as was the case in *Dedeaux.* The other factors considered by the Supreme Court in its analysis of the saving clause

> in *Dedeaux* are not disputed by plaintiffs and would apply to this case in the same manner as they applied to the facts in *Dedeaux*. We conclude that the saving clause does not apply in this case.

Id. at 281 (internal citations omitted); *accord Amos v. Blue Cross-Blue Shield of Ala.*, 868 F.2d 430 (11th Cir. 1989) (per curiam).

Provident argues that *Belasco* and *Amos* dispose of this appeal. The district court concluded otherwise, interpreting two footnotes from the Supreme Court's *Ward* decision to alter savings clause analysis such that the Alabama tort of bad faith is no longer preempted.[2] In footnote six, the *Ward* Court acknowledged that "applying the States' varying insurance regulations creates disuniformities" for national plans in local markets, but that "'[s]uch disuniformities . . . are the inevitable result of the congressional decision to "save" local insurance regulation.'" *Ward,* 526 U.S. at 376 n.6, 119 S. Ct. at 1390 (quoting *Metropolitan Life,* 471 U.S. at 747, 105 S. Ct. at 2393). In the following footnote, the *Ward* Court remarked that the Mississippi law at issue in *Dedeaux* was "not specifically directed to the insurance industry and therefore not saved from ERISA preemption." *Ward,* 526 U.S. at 377 n.7, 119 S. Ct. at 1390. The district court, whose position is championed for obvious reasons by Walker, reasons that these two footnotes replace the *Metropolitan*

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[2] The order granting Walker leave to amend is explicitly based on the principles announced in *Hill v. Blue Cross Blue Shield of Alabama,* an earlier decision by the same district judge which addresses ERISA's preemptive effect on the Alabama law of bad faith after *Ward. See Hill,* 117 F. Supp.2d 1209, 1211-12 (N.D. Ala. 2000).

Life preemption test with a single inquiry: is the law at issue specifically directed to the insurance industry?[4]

Our *de novo* review reveals that the district court's analysis is flawed. In footnote six, the *Ward* Court acknowledges and sanctions the fact that laws falling under the protection of the savings clause will not be uniform across state lines. Footnote six does not address the analytical steps a court must take to reach a savings clause decision: instead, the footnote comments only on the *results* of such a decision. The calculus of *Metropolitan Life* is untouched.

Like footnote six, *Ward*'s footnote seven provides commentary on preexisting law. As the Court held in *Dedeaux,* the common sense inquiry is satisfied only in limited circumstances: "a law must not just have an impact on the insurance industry, but must be *specifically directed toward that industry." Dedeaux,* 481 U.S. at 50, 107 S. Ct. at 1554 (emphasis added). *Ward*'s footnote seven uses identical language, commenting that Mississippi's tort of bad faith cannot survive preemption because it is *"not specifically directed to the insurance industry." Ward,* 526 at 377 n.7, 119 S. Ct. at 1390 (emphasis added). Footnote seven merely comments on the fact that the Mississippi law failed the common sense test; it does not create a new standard for analyzing ERISA's savings clause.

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[4] "To this court, the only question that remains is whether Alabama's cause of action for bad faith is limited to the insurance industry." *Hill,* 117 F. Supp.2d at 1212. The *Metropolitan Life* standard was not applied.

Application of the *Metropolitan Life* standard reveals that the Alabama tort of bad faith is preempted. To begin with, the tort fails the common sense test. The Alabama law, as we have earlier held, is rooted in the common law of contract and tort. *Belasco,* 833 F.2d at 281. Such common law roots, according to the Supreme Court, make it less likely that the law regulates insurance under the common sense inquiry. *Dedeaux,* 481 U.S. at 50, 107 S. Ct. at 1554. The fact that the Alabama tort has been codified to apply specifically to the insurance industry does not erase the presence of common law roots.

Next we decide whether Alabama's tort of bad faith regulates "the business of insurance" as defined by the McCarran-Ferguson Act. With respect to the first inquiry, whether the law spreads or transfers the policyholder's risk, the Supreme Court's answer is "no." In *Dedeaux,* the Court held that the correlative tort under Mississippi law failed to achieve this goal. 481 U.S. at 50, 107 S. Ct. at 1554. Indeed, Walker does not even offer an argument on this point.

The second inquiry under the McCarran-Ferguson Act is whether the law is "an integral part of the policy relationship between the insurer and the insured." *Pireno,* 458 U.S. at 129, 102 S. Ct. at 3009. While it is unclear exactly what this factor requires, the *Ward* Court determined that it is certainly satisfied when the law at issue "changes the bargain between insurer and insured." 526 U.S. at 374, 119 S. Ct. at 1389-90. In *Ward,* the notice-prejudice rule created a new contract term: the insurer must prove actual prejudice before refusing to pay a late claim. *Id.* The tort of bad faith, however, changes no contract term because the obligation of good faith is implied in every contract under Alabama law. Ala. Code

§ 7-1-203. As the Supreme Court observed, the effect of the law of bad faith is not on the terms of the contract but on the nature of the remedy: the tort allows a plaintiff to recover punitive damages. *Dedeaux,* 481 U.S. at 51, 107 S. Ct. at 1555. As such, the tort "is no more 'integral' to the insurer-insured relationship than any State's general contract law is integral to a contract made in that State." *Id.*

The third inquiry under McCarran-Ferguson is whether the law applies only within the insurance industry. While only applicable to insurance cases, *American Cast Iron Pipe Co. v. Williams,* 591 So.2d 854, 857 (Ala. 1991), the statute is a product of basic common law principles. *Belasco,* 833 F.2d at 281. These principles may be summoned in any breach of contract case. Thus satisfying – at best – one of the McCarran-Ferguson factors, the Alabama tort of bad faith is not saved from preemption. When the *Dedeaux* Court reached an identical end to its McCarran-Ferguson analysis, the Mississippi tort of bad faith fell outside the savings clause. 481 U.S. at 51, 57, 107 S. Ct. at 1555, 1558. True, the state law at issue need not satisfy all three of the McCarran-Ferguson factors, *Ward,* 526 U.S. at 373-74, 119 S. Ct. at 1389, but the satisfaction of one factor will not save a state law from preemption where the common sense test is unmet.

Even if we did agree with the district court's method of analyzing the savings clause, post-*Ward* precedent in our circuit holds that ERISA preempts the Alabama tort of bad faith. *Butero v. Royal Maccabees Life Ins. Co.,* 174 F.3d 1207, 1215 (11th Cir. 1999). The decision in *Butero* is dispositive because "the law of this circuit is 'emphatic' that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision." *Cargill v.*

Turpin, 120 F.3d 1366, 1386 (11th Cir. 1997). Thus, *Butero, Belasco,* and *Amos* remain good law.

III. CONCLUSION

The Alabama state law of bad faith relates to employee benefits, but does not regulate insurance. Walker's claim is therefore preempted by ERISA. 29 U.S.C. § 1144(b)(2)(A). Accordingly, we REVERSE the decision of the district court and REMAND for a decision consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHNNY E. WALKER,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	
v.	)	CV-00-AR-2253-S
	)	
PROVIDENT LIFE & ACCIDENT INSURANCE CO.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Feb. 6, 2001)

Life never provides a 100% guarantee of anything except for death and taxes. This is certainly true when considering whether *Ryan Hill v. Blue Cross Blue Shield of Alabama*, 117 F.Supp.2d 1209 (N.D. Ala.2000), was correctly decided.

By its objection to the motion of plaintiff, Johnny E. Walker ("Walker"), for leave to amend his complaint to add a claim of bad faith refusal to pay, defendant, Provident Life & Accident Insurance Co. ("Provident Life"), is asking this court to acknowledge that it was wrong in *Hill*. This court is not inclined to retreat from *Hill*, where this court explained its understanding of *UNUM Life Insurance Co. v. Ward*, 119 S.Ct. 1380 (1999). This court need not retreat unless it is instructed to do so by a higher court.

There is now in the Supreme Court of the United States a petition for *certiorari* that requests a review of the Fifth Circuit's opinion in *Corporate Health Insurance, Inc. v. Texas Department of Insurance*, 220 F.3d 641 (5th Cir.2000). This presents an opportunity for the Supreme Court to enlighten us all on the subject at hand. On January 8, 2001, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States on the reach of the "savings clause". If the Solicitor General accepts the Supreme Court's invitation, and if his brief is consistent with the brief *amicus curiae* that was filed in support of the Texas Department of Insurance in the Fifth Circuit by the Solicitor of Labor, the position of the United States will be consistent with this court's conclusion in *Hill* that ERISA does not preempt state laws if they regulate insurance and if they are aimed only at the insurance industry. The Solicitor of Labor, at page 22 of his *amicus* brief before the Fifth Circuit, described the Texas statute there under consideration as follows:

> [T]he HMO Act appears to be specifically tailored to the insurance industry and applies only in that context.

At that point, the Solicitor of Labor dropped the following footnote:

> The United States argued in *Ward* that *Pilot Life* does not in itself require preemption of a state law that regulates insurance **even if it provides a state law cause of action or remedy.**

(emphasis supplied).

In other words, the Solicitor General in *Ward* had already provided the answer of the United States to the big question. Now the question is whether that answer changes with administrations.

Consistent with *Hill* and with what three other judges of this court have held since *Hill*, a separate order granting plaintiff's motion for leave to amend with [sic] be entered.

DONE this 6th day of February, 2001.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12100-GG

(Filed Mar. 15, 2002)

JOHNNY E. WALKER,

Plaintiff-Appellee,

versus

PROVIDENT LIFE & ACCIDENT INSURANCE CO.

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: TJOFLAT, BIRCH, Circuit Judges, and GOLDBERG*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested

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* Honorable Richard W. Goldberg, Judge, U.S. Court of International Trade, sitting by designation.

that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

(2)

No. 01-1836

Supreme Court, U.S.
FILED
JUN 26 2002
CLERK

In The

Supreme Court of the United States

JOHNNY E. WALKER,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF OF PETITIONER

THE RECENT DECISION IN *RUSH PRUDENTIAL HMO v. MORAN* PROVIDES ADDITIONAL REASON FOR GRANTING THE WRIT.

ERISA § 502 "provides the exclusive vehicle for actions asserting a claim for benefits under health plans governed by ERISA." *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. ___ (June 20, 2002) (Thomas, J., dissenting). Under *Pilot Life*[1] and the line of precedents discussed in *Moran*,[2] claims covered by § 502 are subject to federal remedies exclusively. *Moran,* slip op., pp.18-20. Hence, no state law may supplant the remedies provided in § 502.

In *Pilot Life,* in dictum, the Court extended ERISA exclusivity beyond claims covered by § 502. *Pilot Life* held that state law may not "supplant or supplement" ERISA remedies. *Pilot Life,* 481 U.S. at 56. Walker urges that the phrase "or supplement" is error, because it conflicts with the explicit intent of Congress, and hence with traditional pre-emption jurisprudence. Walker urges that the Court should not "turn [the] dictum into holding." *Moran,* slip op., p.21.

The current petition presents exactly that issue. Walker advocates the following rule of law:

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[1] *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987).

[2] *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133 (1990); *FMC Corp. v. Holliday,* 498 U.S. 52, 60 (1990); *Pilot Life, supra; Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58 (1987); *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 146-47 (1985).

Statement of law urged by petitioner Walker

> State law remedies may not supplant remedies available under § 502(a); however, State insurance regulation may supplement ERISA remedies, provided that claims for ERISA benefits are removable to federal court to be determined by a federal judge sitting as factfinder in accordance with federal common law and the burdens of proof set forth in *Firestone v. Bruch.*[3]

Where remedies are concerned, the exclusivity doctrine overrides the express terms of the saving clause. The dissent in *Moran* sets out the major reason why. The reason is "Congress' interest in creating a uniform federal law of employee benefits" which will "encourage the formation of employee benefit plans." *Moran, supra* (Thomas, J., dissenting). Under the facts and procedural posture of the current petition, this concern is entirely satisfied. There is no impediment to fulfilling both of the goals which are the intent of Congress; that is, the goal of uniformity and the goal expressed in the saving clause.

In the current case, Walker's claim for benefits asserted against the insurance company will be determined entirely in accordance with the uniform federal law of employee benefits. His claim for benefits is brought in federal court under ERISA § 502. If the Court were to grant the petition, it would be in order to restore traditional pre-emption jurisprudence while at the same time satisfying the exclusivity concerns expressed in *Moran.*

ERISA's purpose of uniformity applies to employers, not insurers. Congress' concern was that employers as

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[3] *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989).

administrators "would not have to administer their plans differently in each state in which they had employees." *Fort Halifax Packing Co., Inc. v. Coyne,* 107 S.Ct. 2211, 2217 (1987) ("It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities."). The same concern does not apply to insurance companies, which are already subject to the varying rules of the fifty states. The respondent in the current case is an insurance company, subject to the insurance regulations of the State of Alabama.

Under the above statement of law urged by Walker, ERISA's "deemer clause" plays a significant part in the statutory framework. The deemer clause provides in relevant part that no employee benefit plan "shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts. . . . " 29 U.S.C. § 1144(b)(2)(B). Hence, employers are excused from compliance with State regulations; insurance companies are not.

The most plausible interpretation of the deemer clause is that the States may continue to regulate insurers, but that the States would not acquire any jurisdiction to regulate employers in the area of benefits. The deemer clause would serve no purpose otherwise. ERISA thus permits a State to exact reasonable penalties from insurance companies subject to its regulation, but not from employers. It follows that a State may exact a penalty from an insurance company in the aftermath of a federal court ERISA judgment. An insurer which has been found

to have acted in an arbitrary and capricious fashion in denying a meritorious ERISA claim presented by one of the States' citizens may be subject to a regulatory penalty.

Neither the word "exclusive" nor any synonym appears in ERISA. The doctrine of exclusivity of remedies is a construction of the federal statute.[4] The Court's construction has not entirely cleared up potential interpretative complications in light of the saving clause, under which ERISA does not "exempt or relieve" insurance companies from State regulation. The sensible interpretation of the deemer clause proposed by Walker perhaps might alleviate some of the "unhelpful drafting of these antiphonal clauses." *Moran,* slip op., p.7.

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[4] Consideration of pre-emption issues starts "with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 67 S.Ct. 1147, 1152 (1947). Field pre-emption is inferred by the courts only when Congress has regulated the area comprehensively or when the subject is peculiarly within the federal domain. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371 (1985) (applying field pre-emption either where Congress "left no room" for state regulation or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"). ERISA contains no express or implied private right of action for extra-contractual damages. *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 146-47 (1985). Therefore, it cannot be said that ERISA "left no room" for state regulation of aggravated or egregious violations.

CONCLUSION

ERISA does not "exempt or relieve" the respondent from being subject to the insurance regulations of the State of Alabama, so long as the regulations do not infringe on the exclusively federal turf carved out in ERISA § 502. State laws limited to the insurance industry providing extra-contractual damages are preserved. The Court should grant the petition, and restore traditional pre-emption jurisprudence by holding that the word "supplement" in the dictum in *Pilot Life* is not a correct statement of the law where a State insurance law applies to exact a penalty from an insurance company which has been found by a federal court to violate ERISA.

This Court should grant the writ and reverse the judgment below. Walker's cause of action under Alabama insurance law is not pre-empted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 18 2002
CLERK

No. 01-1836

IN THE

Supreme Court of the United States

JOHNNY E. WALKER,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF C RTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Provident Life & Accident Insurance Company, is a wholly owned subsidiary of UNUMProvident Corporation, which is a publicly traded corporation on the New York Stock Exchange.

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COUNTERSTATEMENT OF THE CASE

Petitioner initially brought an ERISA plan enforcement action pursuant to 29 U.S.C. § 1132, alleging that Provident Life & Accident Insurance Company ("Provident") failed to pay disability benefits allegedly due him under the Southern Company Long Term Disability Plan. On December 20, 2000, Walker filed a motion for leave to amend his complaint to add a claim under Alabama law alleging bad faith refusal to pay his claim and seeking extracontractual damages therefor. Walker's motion to amend relied on the decision of the district court in *Hill v. Blue Cross Blue Shield of Ala.*, 117 F. Supp. 2d 1209 (N.D. Ala. 2000) (Acker, J.). Provident strongly opposed Walker's motion, on grounds that (1) an Alabama State law bad faith claim is not saved from preemption by the "saving clause;" and (2) a state law bad faith claim is preempted because it conflicts with ERISA's exclusive statutory enforcement mechanism.

The district court granted Walker's motion to amend the complaint, reaffirming its previous decision in *Hill*, and, later, amended its order to permit Provident to file a petition for interlocutory review under 28 U.S.C. § 1292(b). Provident did so on March 8, 2001. On April 20, 2001, the Eleventh Circuit Court of Appeals granted Provident's petition. On April 30, 2001, the district court stayed all proceedings in the trial court pending adjudication of this appeal. On January 23, 2002, the Eleventh Circuit reversed the district court, holding that the Alabama tort of bad faith does not "regulate insurance" under the ERISA saving clause analysis and is, therefore, not saved from preemption.

Walker v. Provident Life & Accident Ins. Co., 279 F.3d 1289, 1293 (11th Cir. 2002).[1]

The Eleventh Circuit denied Petitioner's Petition for Rehearing on March 15, 2002 and issued its judgment as a mandate on March 26, 2002.

SUMMARY OF ARGUMENT

After the filing of the petition in this case, this Court issued its decision in *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, No. 00-1021, 2002 U.S. LEXIS 4644 (June 20, 2002). That decision removes any sliver of doubt that Petitioner's state law bad faith claim is preempted and overturns recent speculation in a small minority of district courts that a state law bad faith cause of action can survive ERISA preemption. In *Moran*, this Court confirmed its prior holding in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 481 (1987), that ERISA preempts a state law that provides a remedy that supplements or supplants the exclusive remedies of ERISA, regardless of whether the state law "regulates insurance" under the saving clause analysis. Furthermore, subsequent to *Moran*, this Court has recently denied the Petition for Writ of Certiorari in *Patrick v. UNUM Life Ins. Co. of Am.*, No. 01-764, 2002 U.S. LEXIS 4695 (June 24, 2002), in which the plaintiff asserted that a California bad faith claim arising from the denial of ERISA plan benefits was saved from preemption under ERISA.

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1. As noted by Petitioner, although the Eleventh Circuit opinion identifies UNUMProvident Corp. and Southern Co. Servs., Inc. as Defendants, those two parties were dismissed from the underlying case on September 26, 2000 and November 16, 2000, respectively, and are not involved in this petition.

Petitioner's argument that this Court should allow the Alabama bad faith claim as a remedy that "supplements" the ERISA remedies under § 502(a) is directly contrary to both the majority opinion and the dissent in *Moran* and to this Court's previous decisions, including *Pilot Life*. Moreover, the opinions from the Second and Third Circuit cited by the Petitioner in his pre-*Moran* brief do not establish any split among the circuits as to ERISA's preemption of state law causes of action which conflict with the exclusivity of ERISA's remedial scheme. Petitioner's arguments on this point amount to unsupported policy arguments for a change in the law, which are appropriately directed toward Congress and not toward this Court.

Moreover, Petitioner's argument for allowing the "supplementation" of ERISA remedies by a state law bad faith cause of action assumes the false premise that the Alabama tort of bad faith is a "law . . . which regulates insurance" within the meaning of the ERISA saving clause. The court below did not even reach the issue of whether Alabama's bad faith cause of action conflicts with the exclusivity of ERISA's remedies because it found that Alabama's bad faith cause of action is not a "law . . . which regulates insurance" within the meaning of the ERISA saving clause. The court of appeals in the case below confirmed prior Eleventh Circuit precedent holding that the Alabama tort of bad faith is no different than the Mississippi bad faith claim in *Pilot Life*, which this Court held was not within ERISA's insurance saving clause. Thus, even if the Petitioner's state law claim was not in conflict with the exclusivity of ERISA's remedies, which it is, it would be preempted under ERISA's express preemption provision.

The Eleventh Circuit specifically rejected Petitioner's argument that this Court's decision in *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999) altered prior decisions from this Court and the Eleventh Circuit applying the saving clause analysis. *Walker*, 279 F.3d at 1292-93. Petitioner has not cited any post-*Ward* court of appeals decisions or decisions from the highest court of any state that conflict with that holding. Indeed, every circuit court decision since *Ward* has held that state bad faith claims do not "regulate insurance" under ERISA and/or are preempted because they conflict with the exclusivity of ERISA's civil enforcement scheme. *See Howard v. Coventry Health Care of Iowa, Inc.*, No. 01-3067, 2002 U.S. App. LEXIS 11092 (8th Cir. June 7, 2002) (Iowa bad faith claim does not "regulate insurance" so as to be saved from preemption under ERISA); *Moffett v. Haliburton Energy Servs.*, 291 F.3d 1227 (10th Cir. 2002) (Wyoming bad faith cause of action is not saved from preemption and conflicts with the exclusivity of ERISA's remedial scheme); *Hotz v. Blue Cross & Blue Shield of Mass.*, 292 F.3d 57 (1st Cir. 2002) (state unfair claims settlement action is not saved from preemption and conflicts with ERISA's remedies); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001) (Alabama bad faith claim is not a law that "regulates insurance" and conflicts with ERISA's exclusive remedies). The only state supreme court to address the issue to date holds that a state bad faith claim is not saved from preemption under ERISA. *Midwest Sec. Life Ins. Co. v. Stroup*, 730 N.E.2d 163 (Ind. 2000). Thus, the lower courts are completely consistent with this Court's precedent in rejecting arguments like those made by Petitioner.

Petitioner's argument is nothing more than a request that this Court overturn a body of law that was reaffirmed as recently as June 2002 in *Moran*.

REASONS FOR DENYING THE WRIT

I. *Moran* Confirms Prior Precedent Of This Court Regarding ERISA Preemption.

This Court's decision in *Moran* confirms that ERISA preempts any state law that purports to provide a remedy that either supplements or supplants the exclusive remedies of ERISA, regardless of whether the state law "regulates insurance." This Court held that the state law in *Moran* was not a state remedial law and therefore did not conflict with the exclusivity of ERISA's remedies. In doing so, this Court reaffirmed that ERISA's remedies are exclusive and that any state law that does purport to provide a remedy arising out of the processing of a claim for ERISA plan benefits, as does the Alabama bad faith claim in this case, is preempted.

A. ERISA Implicates Two Different Modes of Preemption.

As recognized in *Moran*, ERISA implicates two different modes of preemption analysis: "express preemption" and "conflict preemption."

First, in accordance with the plain language of ERISA § 514 [29 U.S.C. § 1144], ERISA expressly preempts all state civil laws that "relate to" employee benefit plans save those state laws that regulate insurance, banking, or securities.[2]

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2. "Except as provided in subsection(b) of this section, the provisions of this title . . . shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). "[N]othing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A).

This is ERISA's "express preemption" provision under which state laws need not be in actual conflict with ERISA in order to be preempted. Rather, even state laws that are fully consistent with provisions of ERISA are preempted by § 514 unless they fall within the saving clause applicable to state insurance, banking, or securities regulations. *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829-30 (1988); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

Second, a finding that a state law is a "law . . . which regulates insurance" within the meaning of ERISA § 514(b)(2)(A) does not mean that the law necessarily can be applied in the context of an ERISA plan. Rather, ERISA also preempts state laws to the extent that they "conflict[ ] with the provisions of ERISA or operate[ ] to frustrate its objects." *Boggs v. Boggs*, 520 U.S. 833, 841 (1997); s*ee also Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001) (state statute that mandates the beneficiary of certain employee benefits on the death of the participant is preempted where it "directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents"). This "conflict preemption" applies even to state laws, such as insurance regulatory laws, that would otherwise be saved from preemption under the express preemption provisions of ERISA § 514. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993) ("State law governing insurance generally is not displaced, but 'where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs").[3]

3. The notion that even an express saving clause does not save state laws that fail a "conflict preemption" analysis is not a notion that is peculiar to ERISA. Most recently, in *Geier v. Am. Honda Motor* (Cont'd)

B. *Pilot Life* Found That Mississippi's Tort of Bad Faith is Preempted Under Each Type of Preemption Analysis.

The unanimous decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), applied both express and conflict preemption principles under ERISA to hold that a state law bad faith claim is preempted. The plaintiff was a beneficiary under an employee benefit plan insured by *Pilot Life*. The issue before the Court was whether ERISA "pre-empts state common law tort and contract actions asserting improper processing of a claim for benefits under an insured employee benefit plan." *Pilot Life Ins. Co.*, 481 U.S. at 43. The plaintiff argued that ERISA does not preempt a cause of action under Mississippi's law of bad faith because that law is a state law which regulates insurance and is thus saved from preemption under ERISA's "express preemption" clause, § 514(b).

The Court rejected the plaintiff's argument for two reasons. First, as explained in subpart I.B(1), below, the Mississippi bad faith claim is preempted under "express" preemption principles because it does not "regulate insurance" and is not "saved" from preemption. Second, as explained next in subpart I.B(2), the state law claim is also preempted under "conflict" preemption principles, even assuming arguendo that the state law claim

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(Cont'd)

Co., 529 U.S. 861, 870, 886 (2000), the Supreme Court held that the saving clause of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, *et seq.* (1988 ed.) did not save from conflict preemption a state common law tort action. Noted the Court, "this Court has repeatedly 'declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.' " 529 U.S. at 870 (quoting *United States v. Locke*, 529 U.S. 89, __ (2000)).

"regulate[s] insurance," because the state law purports to supplement ERISA's civil enforcement scheme, which the Court held is the exclusive means of remedying claims of improper processing of plan benefits.

1. Mississippi's bad faith law is expressly preempted because it is not a law which regulates insurance.

First, the Court determined that Mississippi's bad faith law, while certainly "identified with the insurance industry," is not a "law . . . which regulates insurance" within the meaning of § 514(b). To reach this conclusion, the *Pilot Life* Court applied the two-part test announced in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) for determining whether a particular state law is a law that regulates insurance under ERISA § 514. Under this two-part test, courts first examine whether the challenged law regulates insurance from "a common-sense view of the matter." *Metropolitan Life*, 471 U.S. at 741. Courts then consider the three factors used to identify the "business of insurance" under the McCarran-Ferguson Act:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 743 (emphasis preserved).

Applying first the common sense test, the Court in *Pilot Life* found that the Mississippi law of bad faith does not regulate insurance from a common sense view because, "[e]ven

though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law." *Pilot Life Ins. Co.*, 481 U.S. at 50.

Turning to the second part of the test, the Court held that an analysis of the three McCarran-Ferguson factors reinforces the conclusion that the bad faith cause of action is not a law that regulates insurance.

> Unlike the mandated-benefits law at issue in *Metropolitan Life*, the Mississippi common law of bad faith does not effect a spreading of policyholder risk. The state common law of bad faith may be said to concern "the policy relationship between the insurer and the insured." The connection to the insurer-insured relationship is attenuated at best, however. In contrast to the mandated-benefits law in *Metropolitan Life*, the common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages. The state common law of bad faith is therefore no more "integral" to the insurer-insured relationship than any State's general contract law is integral to a contract made in that State. Finally, as we have just noted, Mississippi's law of bad faith, even if associated with the insurance industry, has developed from general principles of tort and contract law available in any Mississippi breach of contract case. Accordingly,

> the Mississippi common law of bad faith at most meets one of the three criteria used to identify the "business of insurance" under the McCarran-Ferguson Act, and used in *Metropolitan Life* to identify laws that "regulate insurance" under the saving clause.

Id. at 50-51 (citations omitted).

Thus, the Mississippi bad faith claim is not a "law . . . which regulates insurance" within the meaning of the ERISA saving clause and is therefore not saved from express preemption under that section.

2. More importantly, Mississippi's bad faith law is also preempted because it conflicts with Congress's intent that ERISA's remedies be exclusive.

Second, and "most importantly," *id.* at 57, the Court in *Pilot Life* determined that allowing ERISA beneficiaries to bring varying state causes of action for claims that are within the scope of ERISA's civil enforcement provision "would pose an obstacle to the purposes and objectives of Congress." *Pilot Life Ins. Co.*, 481 U.S. at 52. ERISA contains a civil enforcement provision that includes a panoply of remedies for ERISA plan participants, beneficiaries, and fiduciaries. *See* ERISA § 502(a) [29 U.S.C. § 1132(a)]. The civil enforcement scheme of ERISA "is one of the essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co.*, 481 U.S. at 52. Examining the language and structure of ERISA's civil enforcement provision, and reviewing the legislative history of that provision, the Court concluded "that ERISA's civil enforcement remedies were

intended to be exclusive." *Id.* at 54. Congress's aim was to advance "the public purpose in encouraging the formation of employee benefit plans." *Id.* at 54. A "carefully balanced" and nationally "uniform" remedial scheme would protect the basic rights of beneficiaries while at the same time minimizing the costs of the plans so as not to deter their creation. The Court therefore expressly endorsed the Solicitor General's position that Congress intended "the civil enforcement provisions of ERISA § 502(a) [to] be the exclusive vehicle for actions by ERISA plan participants and beneficiaries asserting improper processing of a claim for benefits." *Id.* at 52.

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly' . . . The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue

> strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

Id. at 54.

Rejecting any suggestion that the saving clause might rescue a state law cause of action from preemption, the Court found that the saving clause itself need be construed so as to implement Congress's intent that ERISA beneficiaries pursue exclusively ERISA remedies. *Id.* at 52 ("our understanding of the saving clause must be informed by the legislative intent concerning the civil enforcement provisions provided by ERISA § 502(a)"); *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. at 870 (The Supreme Court will regularly "decline[]to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.").

C. Supreme Court Case Law Leading up to *Moran* Confirms the Role of Conflict Preemption Under ERISA.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), further focused the Court's emphasis upon the exclusivity of ERISA's civil enforcement provision, § 502, as a source of "conflict preemption" supplementary to ERISA's "express preemption" language in § 514. After finding a Texas common law cause of action preempted under § 514 because it relates to ERISA plans, the Court emphasized the independently preemptive effect of § 502, stating:

> Even if there were no express pre-emption in this case, the Texas cause of action would be pre-

> empted because it conflicts directly with an ERISA cause of action.

Id. at 142.

The principle that ERISA preempts even a state insurance regulatory law if it conflicts with congressional intent pertaining to specific aspects or provisions of ERISA was relied upon yet again in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993). There, the Court found that ERISA preempts a state law that admittedly regulates insurance, and thus otherwise is saved from "express preemption" under § 514, because it conflicts with one of ERISA's purposes. *John Hancock Mut. Life Ins. Co.*, 510 U.S. at 99 (When state insurance regulation "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, federal preemption occurs.").

This Court's decision in *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999) does not alter any of this law. True, the new Solicitor General as *amicus* did seek to "modify" the position of his predecessor by contending that if a state law remedy was a law that regulates insurance, it might not be preempted notwithstanding the exclusivity of ERISA § 502(a). *Ward*, 526 U.S. at 376 n.7. The Supreme Court nevertheless found no need to address this attempted revisionism by the Solicitor General because the plaintiff in *Ward* sought only to maintain a claim under ERISA § 502(a). *Id.; see also Moran*, 2002 U.S. LEXIS 4644, at *43-44 (distinguishing *Ward* from *Pilot Life* because *Ward* did not involve an additional claim or remedy outside of ERISA).

Subsequently, the current Solicitor General has recanted the position taken by his predecessor in *Ward*, returning to

the United States' initial position that was, after all, approved by the Supreme Court in *Pilot Life*. In the words of the Solicitor General:

> After noting that causes of action outside Section 502(a) would lead to the award of judicial remedies, such as compensatory and punitive damages, that Congress had rejected, . . . the Court [in *Pilot Life*] concluded that "the policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA," . . . *That reasoning clearly prevents a State from adopting causes of action under state law to enforce the terms of an ERISA plan (including any incorporated provisions of state law) as an alternative to the cause of action under federal law in Section 502(a)(1)(B). For the same reasons, a State could not under any circumstances make a plan or its insurer liable to the participant or beneficiary for punitive damages*. Such a requirement would be far removed from what private parties might ordinarily contract for and would directly upset the policy choices reflected in Congress' inclusion of certain remedies and the exclusion of others.

Brief for the United States as amicus curiae in *Rush Prudential HMO, Inc. v. Moran*, No. 00-1021, 2000 U.S. Briefs 1021 (LEXIS), at Part III(B)(1)(f) (emphasis added).

This Court essentially adopted the Solicitor General's position in *Moran*.

II. *Moran* Confirms That ERISA's Remedies Cannot Be Supplemented By State Law Remedies, Even State Laws That Arguably Regulate Insurance, Because ERISA's Remedies Are Intended To Be Exclusive.

The state law at issue in *Moran* was a state third-party review law. The initial issue addressed by the Court was whether that law "regulate[d] insurance." The Court held that it did "regulate insurance" and that it fell within ERISA's insurance saving clause. The Court then moved on to the next issue, which was whether the state law was a remedial law that would, by definition, conflict with ERISA's civil enforcement provisions. If the fact that the state law was subject to the saving clause was sufficient to remove the law from preemption, as Petitioner suggests in this case, there would have been no need for the Court to address the second issue, i.e., whether the state law in *Moran* was a remedial law that would be preempted because of the exclusivity of ERISA's civil enforcement scheme.

The foundation for the Court's decision in *Moran* was the "overpowering federal policy" of exclusivity under ERISA. *Moran*, 2002 U.S. LEXIS 4644, at *37. The Court explained that ERISA preempts any state law cause of action or remedy that was not authorized by Congress pursuant to 28 U.S.C. § 1132(a). *Id.* at *37-39. Citing this Court's earlier decisions, *Moran* explained that, regardless of whether state law "regulates insurance," if the state law purports to provide a remedy that supplements or supplants the exclusive

remedies of ERISA, it is preempted.[4] *Id.* at *38-39. The Court explained that where there is a "forced choice between the congressional policies of exclusively federal remedies and the 'reservation of the business of insurance to the States,' . . . we have anticipated such a conflict, with the state insurance regulation losing out if it allows plan participants 'to obtain remedies . . . that Congress rejected in ERISA.' " *Id.* at *38 (citing *Pilot Life Ins. Co.*, 481 U.S. at 54). The Court recognized that, under *Pilot Life*, ERISA would not allow a state law cause of action for breach generally or for damages not expressly authorized by § 1132(a). *Id.*

After laying the foundation that ERISA's remedies are exclusive, the Court concluded that the state law at issue in *Moran* did not involve the sort of additional claim or remedy that would conflict with ERISA like the bad faith claim in *Pilot Life*. However, the bad faith claim in this case is virtually identical to the claim in *Pilot Life*. It is undisputed that Petitioner's state law claim is an attempt to supplement the exclusive remedies of ERISA. Thus, unlike the state procedural law at issue in *Moran*, the state remedial law at issue in this case is preempted, whether or not it also "regulates insurance."

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4. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co.*, 481 U.S. 41; *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

III. The Eleventh Circuit Court Of Appeals In The Case Below Found That The Alabama Tort Of Bad Faith Is Not Saved From Preemption By The Saving Clause Because It Does Not "Regulate Insurance."

In the present case, the court below did not reach the conflict preemption issue because it held that the Alabama tort of bad faith is not a "law . . . which regulates insurance" within the language of the saving clause. The Eleventh Circuit held that this Court's decision in *Ward* does not alter the saving clause analysis applied in *Pilot Life* and does not create a new standard for analyzing ERISA's saving clause. *Walker*, 279 F.3d at 1292-93.

The court of appeals applied the *Metropolitan Life* standard applied by this Court in *Pilot Life*. The Eleventh Circuit concluded that the Alabama tort of bad faith fails to satisfy the common sense test because, like the Mississippi bad faith law in *Pilot Life*, the Alabama law of bad faith is rooted in the common law of contracts and torts. *Id.* at 1293.

The court then applied the McCarran-Ferguson factors to determine whether the Alabama tort of bad faith regulates the "business of insurance." Citing prior Eleventh Circuit precedent and *Pilot Life*, the Eleventh Circuit held that the tort did not satisfy the first inquiry, whether the law spreads or transfers the policyholder's risk, noting that the Petitioner did not even offer an argument on that point to the Eleventh Circuit. *Id.* at 1293. Similarly, the court held that the tort of bad faith was not an integral part of the policy relationship between the insurer and the insured. *Id.* The court reasoned that the tort of bad faith does not change any contract term because the obligation of good faith is applied in every contract under Alabama law. *Id.* (citing *Ala. Code* § 7-1-203).

Citing *Pilot Life*, the court concluded that the effect of the law of bad faith is not on the terms of the contract, but on the nature of the remedy since the tort allows the plaintiff to recover punitive damages. *Id.* (citing *Pilot Life*, 481 U.S. at 51). Finally, the court explained that the Alabama tort of bad faith does not satisfy the third inquiry under McCarran-Ferguson as to whether the law applies only within the insurance industry. While recognizing that the law was only applicable to insurance cases, the court explained that Alabama bad faith law is a product of basic common law principles which may be summoned in any breach of contract case. *Id.*

Based on that analysis, the Eleventh Circuit reasoned that, like the Mississippi bad faith law addressed in *Pilot Life*, the Alabama tort of bad faith does not fit within the saving clause language and is, therefore, preempted by ERISA. *Id.* at 1293-94.

IV. Petitioner's Petition Is Based On The Faulty Premise That The Alabama Tort Of Bad Faith Is A "Law . . . Which Regulates Insurance" Within The Meaning Of The ERISA Saving Clause.

Petitioner continues to argue that the Alabama tort of bad faith is a "law . . . which regulates insurance" within the meaning of the ERISA saving clause. As explained above, the court below did not even reach the conflict preemption issue because it found, as it had in numerous previous decisions, that the Alabama tort of bad faith is not a "law . . . which regulates insurance." *Walker*, 279 F.3d at 1294; *see also Gilbert*, 276 F.3d 1292 (*Ward* does not alter *Pilot Life* or binding Eleventh Circuit precedent finding that the Alabama tort of bad faith is not a "law . . . which regulates insurance"); *Butero v. Royal Maccabees Life Ins. Co.*, 174

F.3d 1207, 1211-13 (11th Cir. 1999) (holding that claims for bad faith refusal to pay under Alabama law are completely pre-empted by ERISA); *Engelhardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346, 1354 n.11 (11th Cir. 1998) ("[T]he prayer for punitive damages does not take Engelhardt's claim out of the scope of § 1132(a). If it did, any plaintiff could thwart Congress's intent to completely preempt claims arising out of the denial of ERISA benefits by artful pleading."); *Mullenix v. Aetna Life & Cas. Ins. Co.*, 912 F.2d 1406, 1411-12 (11th Cir. 1990) (citing *Belasco* for the proposition that the saving clause does not apply to claims against the insurer for medical and surgical benefits and for bad faith and fraud, because the Alabama low of bad faith has roots in general principles of tort and contract law and is not "related to" the insurance industry); *Amos v. Blue Cross-Blue Shield of Ala.*, 868 F.2d 430, 431 (11th Cir. 1989) (claim for relief under Alabama bad faith law is completely displaced by ERISA § 502(a)); *Belasco v. W.K.P. Wilson & Sons, Inc.* 833 F.2d 277, 281 (11th Cir. 1987) ("[T]he Alabama law of bad faith appears to us to have the same roots 'in the general principles of . . . tort and contract law' as was the case in *Dedeaux* [v. *Pilot Life*].").

As recognized by the court below and in *Gilbert*, the *Ward* opinion does nothing to change the application of *Pilot Life* to the Alabama tort of bad faith. *Ward* simply applied the saving clause analysis to the California notice prejudice rule — a rule completely different from the bad faith claim addressed in *Pilot Life*.

Petitioner asserts that there is a conflict among the circuits that justifies granting the petition, but does not cite any court of appeals' decision finding that a state law bad faith claim is "a law . . . which regulates insurance" under

the saving clause analysis. In fact, while Petitioner argues that the Alabama tort of bad faith regulates insurance because it is allegedly codified within the "insurance" title of the Code,[5] Petitioner does not explain how the analysis of the saving clause issue in the court below is incorrect. Furthermore, neither of the two court of appeals cases that Petitioner cites — *PAS v. Travelers Ins. Co.*, 7 F.3d 349 (3d Cir. 1993) and *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2d Cir. 1995) — addresses laws analogous to the Alabama tort of bad faith. *PAS* involved a statute that specifically prohibited discrimination in insurance policies, and *Franklin H. Williams Ins. Trust* involved a New York statute relating to the payment of interest on insurance proceeds. In fact, both of these cases applied the same saving clause analysis applied in *Pilot Life*, but reached a different conclusion specific to the statutes at issue in those cases. Those cases are pre-*Ward* and certainly do not hold that *Ward*

5. Petitioner's claim that the Alabama tort of bad faith is codified in Alabama Code § 27-12-24 is incorrect. First, it is logically impossible for Alabama Code § 27-12-24 to be a codification of an existing Alabama common law tort of bad faith. Alabama Code § 27-12-24 was passed by the legislature in 1971, ten years before Alabama recognized cause of action for bad faith and has not been amended since that time. *See Ala. Code* § 27-12-24 (1998); *Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981). Additionally, the Alabama Supreme Court decisions establishing the tort of bad faith do not reference Ala. Code § 27-12-24 in any way, but instead base the tort of bad faith on general principles of tort and contract law. Moreover, the Alabama Supreme Court has repeatedly held that there is no private right of action for violation of the Alabama Insurance Code and more specifically for a violation of the Alabama Insurance Trade Practices Act, which contains Ala. Code § 27-12-24. *American Auto. Ins. Co., v. McDonald*, 812 So. 2d 309, 311-12 (Ala. 2001) (no private right of action for violation of the Alabama Insurance Code). Finally the elements of the tort are quite different from the language of the text of Ala. Code § 27-12-24.

altered the saving clause analysis in any way. No court of appeals has held that *Ward* altered the saving clause analysis. Accordingly, there is simply no split among the circuits as to the application of the saving clause analysis to state law bad faith causes of action or the impact, or lack thereof, of *Ward* on that analysis.

In sum, Petitioner has failed to establish any basis for this Court to conclude that the Eleventh Circuit's holding that the Alabama tort of bad faith is not "a law . . . which regulates insurance" should be reviewed by this Court. There is no conflict with the decisions of another court of appeals, and there is no basis for the exercise of this Court's supervisory power. Moreover, this case does not present an important federal issue that has not been decided by this Court or that has been decided in a way that conflicts with relevant decisions of this Court. *See* S. Ct. R. 10.

V. Regardless Of Whether The Alabama Tort Of Bad Faith Is A "Law . . . Which Regulates Insurance," It Is Pre-Empted By The Exclusivity Of ERISA's Remedial Scheme.

Petitioner's argument that Alabama bad faith claims "regulate insurance" is not only wrong, it is irrelevant to the question of ERISA preemption. This Court's consistent precedent, from *Russell*, through *Taylor* and *Pilot Life*, *Ingersoll-Rand*, and *John Hancock*, and most recently, *Moran*, holds that ERISA's remedies are exclusive and that they may not be supplemented by state law causes of action. Petitioner's theory that *Ward* somehow modified this precedent is not only rebutted by *Moran* but also by consistent authority in the courts of appeals and in the one state supreme court to address the issue since *Ward*. *Howard v. Coventry*

Health Care, supra; *Moffett v. Haliburton Energy, supra; Hotz v. Blue Cross, supra*; *Gilbert v. Alta Health & Life Ins. Co., supra*; *Midwest Sec. Life Ins. v. Stroup, supra.* The Eleventh Circuit's decision below is consistent with all of these cases. There is no reason for this Court to re-address an issue that it has definitively decided on multiple occasions.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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